88-291

CASE NO.

in the

Supreme Court
of the
United States

OCTOBER TERM, 1987

ANTON GREGORY ZUKAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals, Fifth Circuit

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE SUBJECTIVE INTENT OF THE OFFICER IS AN IMPORTANT FACTOR IN DETERMINING WHETHER A DE FACTO ARREST TOOK PLACE?

II.

WHETHER A DE FACTO ARREST TOOK PLACE WHEN THE OFFICER BLOCKED COMPLETELY THE DEFENDANT'S AIRCRAFT, RETAINED POSSESSION OF DEFENDANT'S PILOT'S LICENSE, MEDICAL CERTIFICATE, AND REGISTRATION FOR THE AIRCRAFT, DID NOT INFORM THE DEFENDANT THAT HE WAS FREE TO LEAVE, ACCUSED THE DEFENDANT OF CRIMINAL ACTIVITY, AND THE DEFENDANT DID NOT BELIEVE HE COULD LEAVE AND, IN FACT, COULD NOT HAVE LEGALLY OPERATED THE AIRCRAFT WITHOUT THE DOCUMENTS?

III.

WHETHER MATCHING THE CHARACTERISTICS OF THE "NESTOROFF" DRUG PROFILE CREATES REASONABLE SUSPICION TO JUSTIFY DETAINING A DEFENDANT?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the petitioner and the United States of America.

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BRIEF OF PETITIONER ON JURISDICTION

Petitioner, Anton Gregory Zukas, respectfully prays that a writ of certiorari issue to review the judgment and opinion dated April 12, 1988, and order on

rehearing dated June 17, 1988, by the United States Court of Appeals for the Fifth Circuit entered in Case No. 87-1568, which affirmed the judgment of conviction and sentence of the United States District Court of the Western District of Texas.

OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, denying the defendant's direct appeal is reported as *United States v. Zukas*, 843 F.2d 179 (5th Cir. 1988). (A-1).[1] The order of the Court denying the defendant's Motion to Suppress is unreported. That order is reprinted in the Appendix to this Petition. (A-10).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of Rule 17(a) and (c) of the Rules of the Supreme Court and 28 U.S.C. § 1254(1). This petition is filed within the authorized time period following the Fifth Circuit's Order on Rehearing. See Supreme Court Rule 20.1 and 20.4.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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[1]The symbol "A" is used to designate the Appendix of this Petition.

STATEMENT OF THE CASE

The defendant was indicted on November 18, 1986. (R-1-287).[2] The defendant filed a pretrial Motion to Suppress Evidence on December 24, 1986. (R-2-207-225). This Motion to Suppress raised issues which are presented by this Petition. The Motion to Suppress Evidence was denied on April 30, 1987, and the court entered its findings of fact and conclusions of law on July 16, 1987. (R-1-13-24,33) (A-10).

A Superseding Information was filed on May 1, 1987, charging the defendant with conspiracy to possess with intent to distribute cocaine. (R-1-32). The defendant and the government entered into a plea agreement for a conditional plea of guilty to the one-count Superseding Information on May 1, 1987. (R-1-28). The defendant reserved his right to appeal, and the government consented to the conditional plea. (R-1-26,27).

The facts giving rise to the Motion to Suppress are set forth in some detail in the opinion of the United States Court of Appeals, *United States v. Zukas*, 843 F.2d 179 (5th Cir. 1988). (A-1).

Petitioner, Anton Zukas, a pilot, was hired to fly a passenger on a Navajo aircraft on a charter flight from Miami, Florida to California. (R-4-21). The plane arrived at the Atlas West Terminal, a fixed base operation for private aircraft (FBO) at the Austin Municipal Airport around 9:30 p.m. (R-4-20). Zukas purchased 198 gallons of fuel and paid $386.10 in currency for the fuel. The amount of fuel purchased exceeded the factory fuel capacity of the aircraft. (R-4-20,117).

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[2]The record references in this Petition are to the Record on Appeal which was before the Fifth Circuit and which has been returned to the United States District Court for the Western District of Texas. This Record is available for transmittal to this Court should the Court so order.

Around 9:30 p.m., a paid informant told Robert Nestoroff, a Texas law enforcement officer, of the arrival of the aircraft, the purchase of the fuel in cash, that the passenger was nervous, and that the aircraft had come from Miami via Tallahassee. (R-4-20,21). Nestoroff went to the airport and observed that the side windows of the plane had tinted windows and that there were "Medico" high security locks on all keyed openings of the aircraft. (R-4-32). At the defendant's motel, Nestoroff learned the defendant's name, that he had paid $39 cash for the room and had requested a wake-up call for 5:30 a.m. (R-4-38,41,117).

At the Motion to Suppress hearing, Nestoroff testified that he felt "like something was going on" and, based upon the following recited facts, he decided to stop and interrogate the defendant. (R-4-42). The facts, according to Nestoroff, justifying the initial stop are briefly summarized as follows:

1. Cash Payment for Fuel and Motel Room. However, Nestoroff admitted that many FBO's will not accept checks and will give discounts for cash purchases as opposed to using a credit card. (R-4-25,26,131).

2. Medico High Security Locks on Aircraft. However, Nestoroff admitted he has also seen Medico locks on numerous legitimate aircraft from Florida due to the theft problem which exists in Florida. (R-4-79).

3. Tinted Windows. Nestoroff admitted that tinted windows are not uncommon in airplanes in order to reduce glare aloft. (R-4-35).

4. "Panther" Conversions or the Addition of Long Range Fuel Tanks on the Aircraft. At the hearing, Nestoroff admitted that the range of the standard Navajo is much less than that of comparable twin engine planes, and it is very common to add extra fuel tanks, known as "Panther

conversions," to Piper Navajos to solve the short full range problem. (R-4-22,23,129).

5. Flight Route. Nestoroff was suspicious of the flight route from Miami, Florida to Austin, Texas, with a stop in Tallahassee, Florida. (R-4-21,83). His reasoning was questioned by another witness, FAA expert Throop, who explained that a straight flight from Miami to Austin would be over water, which would require additional equipment and "ADIZ clearances" from the U.S. Air Force. Nestoroff believed that the origin of the flight from Miami was suspicious because Miami is a "drug source city." "We have learned from federal sources, from local sources and from just observing the news media that Miami is a drug source city, probably more so than anywhere in the United States." Nestoroff at R-4-83.

6. Time of Arrival and Departure. The defendant arrived at the FBO at around 9:30 p.m. and returned to the plane around 8:00 a.m. (R-4-59,82).

7. Dress and Attitudes of Pilot and Passenger. The passenger was described by the confidential informant as a young "Miami Vice" type, dressed in pastel clothing, wearing an earring, gold jewelry, and seemed to have plenty of money. (R-4-30). The defendant, a charter pilot, was wearing blue jeans and a shirt—not a uniform. (R-4-89). This dress fit Nestoroff's "profile" for drug trafficking. (R-76,88).

8. Owner of Aircraft. The United States Customs computer revealed that the aircraft was registered to Sun State Aviation, a legitimate company. No planes actually owned by Sun State had ever been seized for narcotic violations, and Sun State is not known as a front for narcotic violators. (R-4-39).

9. Prior Arrests of the Defendant. Nestoroff also learned from the Customs computer that the defendant was a pilot who had been arrested—but not convicted—for possession of marijuana aboard an aircraft in 1979. (R-4-40; R-3-32,33).

Detention and De Facto Arrest

Nestoroff decided he would stop and detain the defendant when he returned to the aircraft in the morning because he had a "feeling," "felt like something was going on," and felt the defendant fit his "profile" for drug trafficking. (R-4-42,88). In preparation for the next morning, Nestoroff requested the assistance of Officers Wolsh and Krug, as well as a narcotics dog, "Jack the Ripper." These preparations were completed the night prior to the stop. (R-4-42,43). Prior to his approach to the plane and defendant, Nestoroff knew the name and address of Zukas, that Zukas had a valid pilot's license, the registered owner of the aircraft, that the aircraft had a valid registration certificate, and the origin and destination of the aircraft. (R-4-32,38,40).

He had a "strong suspicion" in his mind that something was going on, but he "didn't know at that point exactly what [he] had." (R-4-44,58). Nestoroff decided to perform a pretextual "ramp check" in the hope that something would develop. (R-4-61,93).

After the defendant completed preflight preparations and departure of the aircraft appeared imminent, Nestoroff pulled his car directly in front of the wing of the plane. The aircraft, parked in a corner formed by fences, was completely blocked, unable to move because of Nestoroff's car. Nestoroff acknowledged that the defendant could not have departed unless he moved his car. (R-4-61,62,70,115). Nestoroff showed his badge and informed the defendant that he was conducting a "ramp check" and wanted to see the defendant's pilot's

license, medical certificate, registration and paperwork for the aircraft. (R-4-63). Nestoroff checked the documents and found them in order, but retained possession of them, and informed the defendant twice that he suspected that the aircraft was hauling contraband. (R-63-66). The defendant did not believe that he was free to leave and was never told that he was free to leave and, in any event, could not have left without his documents and without Nestoroff moving his car. (R-4-18,68-70). Nestoroff continued to retain possession of the documents during the entire stop and detention. (R-4-66).

During the detention of the defendant, Nestoroff requested and received permission to search the aircraft. (R-4-66). The officers searched the luggage and found cocaine in the suitcases which had been on board the aircraft. (R-4-104).

The Court of Appeals recognized that:

> The suspicion did not rise to the level of probable cause, though, until after Zukas and the passenger had consented to a search that resulted in the discovery of cocaine. Although both sides agree that the search was voluntary, it cannot be justified if the preceding level of intrusion made the seizure a *de facto* arrest before the consent was given, as Zukas argues was the case. We hold, however, that, based upon the totality of the circumstances, the level of intrusion prior to the consent search was no more than was necessary to dispel the officer's legitimate suspicions. . . . We concede Zukas' argument that it is clear from the facts and from Nestoroff's testimony that Nestoroff would have been most reluctant to let the plane fly away; however, his subjective intent is not important in determining whether an arrest was made . . ." (A-8).

In analyzing the facts cited by Nestoroff to justify his seizure of the defendant, the Court of Appeals noted that:

> Admittedly, several of these factors have no independent significance except that they fit the DEA's drug smugglers' profile. Taken alone, no single factor would support a reasonable, particularized suspicion with regard to the activities of Zukas and his passenger. When these factors, however, are considered together with Zukas's prior record, the specific activities observed by the agent and informant, and the agent's level of experience and expertise, their significance renders the whole greater than the sum of its parts. When the officers began questioning Zukas and the passenger, therefore, the seizure was supported by reasonable suspicion and justified to the extent that it was no more than an investigatory stop. (A-7-8).

REASONS FOR GRANTING CERTIORARI

THE CIRCUITS ARE IN CONFLICT AS TO THE SIGNIFICANCE OF AN OFFICER'S SUBJECTIVE INTENT WHEN EVALUATING WHETHER AN ARREST HAS OCCURRED. THE OPINION IN THIS CASE IS A DEPARTURE FROM THE PRIOR OPINIONS OF THE FIFTH CIRCUIT. THIS COURT NEEDS TO CLARIFY WHETHER SUBJECTIVE INTENT TO ARREST IS RELEVANT.

UNDER THE FACTS OF THIS CASE, THE COURT OF APPEALS MADE AN ERRONEOUS APPLICATION OF LAW IN FINDING NO ARREST OCCURRED WHEN THE OFFICER BLOCKED THE PETITIONER'S MOVEMENT, HELD HIS PILOT'S LICENSE AND DOCUMENTS, AND ACCUSED THE PETITIONER OF CRIMINAL ACTIVITY WITHOUT INFORMING HIM HE WAS FREE TO LEAVE.

THERE IS A CONFLICT AMONG THE CIRCUITS REGARDING THE APPLICATION AND SIGNIFICANCE OF DRUG COURIER PROFILES. IT IS IMPERATIVE THAT THIS COURT ISSUE A DEFINITIVE OPINION TO PREVENT FURTHER CONTRADICTORY RULES BY LOWER COURTS AND INFRINGEMENT ON THE RIGHT TO TRAVEL OF INNOCENT CITIZENS.

I.

THE SUBJECTIVE INTENT OF THE OFFICER IS AN IMPORTANT FACTOR IN DETERMINING WHETHER A DE FACTO ARREST TOOK PLACE

The Court of Appeals held that the officer's "subjective intent is not important in determining whether an arrest was made." (A-8). Whether an arrest was made or not was critical since the Court of Appeals acknowledged that probable cause did not exist until the discovery of the cocaine after consent to search was obtained.

The officer planned to hold the defendant if he refused consent to a search, at least until he contacted a prosecutor and decided how to proceed. (R-4-115-116). However, the panel opinion held that:

> **. . . however, his subjective intent is not important in determining whether an arrest was made . . .**"[3] (A-8)

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[3]The panel opinion's total disregard of the officer's admitted subjective intent to detain is a departure from the longstanding and established precedent of the Fifth Circuit. As the Fifth Circuit wrote in the *en banc* opinion in *United States v. Warren*, 578 F.2d 1058, 1071 (5th Cir. 1978):

(FOOTNOTE CONTINUED NEXT PAGE)

The panel opinion does not cite any prior case law to support the proposition that subjective intent of the officer is not a pertinent factor in determining whether the defendant was arrested prior to consenting to search. There is a significant conflict between the Circuits on whether subjective intent of an officer is a factor to be considered. *Compare* cases holding subjective intent is a pertinent factor: *United States v. Lueck*, 678 F.2d 895, 900 (11th Cir. 1982) (subjective intent of officers as to whether they considered defendant at liberty to leave investigation site is a factor to be considered in determining whether custodial interrogation occurred); *United States v. Magdaniel-Mora*, 746 F.2d 715, 723 (11th Cir. 1984) ("In determining whether an initially routine boarding and safety inspection has metamorphosed into a custodial detention at the time of questioning, this court weighs four factors: . . . (2) whether the interrogating officer subjectively intended a detention beyond that needed for a routine stop and search . . ."); and *United States v. Longmire*, 761 F.2d 411, 414 (7th Cir. 1985) ("Among the circumstances courts consider in determining whether an

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(FOOTNOTE 3 CONTINUED)

> The Fifth Circuit employs a four-factor test to ascertain whether an interrogation occurred in a custodial context. These factors include: . . . (2) **whether the subjective intent of the officer conducting the interrogation was to hold the defendant,** . . .

Again in *United States v. Morin*, 665 F.2d 765, 769-770 (5th Cir. 1982), the importance of the officer's subjective intent was reiterated:

> This Court utilizes a four-factor test to determine when an interrogation rises to the level of an arrest requiring probable cause. These factors are: . . . (2) **whether the subjective intent of the officer conducting the interrogation was to hold the defendant,** . . . *United States v. Warren*, 578 F.2d 1058, 1071 (5th Cir. 1978).

See also *United States v. Jonas*, 639 F.2d 200 (5th Cir. 1981).

arrest was made are an officer's intent in stopping the individual, *Sibron v. New York*, 392 U.S. 40, 46-7, 88 S.Ct. 1889, 1894, 20 L.Ed.2d 917 (1968)").

Compare cases holding subjective intent of officer is irrelevant. *United States v. Beck*, 598 F.2d 497, 500 (9th Cir. 1979) ("whether an arrest has occurred depends on an evaluation of all the surrounding circumstances . . . and not the subjective intent of the officers involved") and *Borodine v. Douzanis*, 592 F.2d 1202, 1206 n.2 (1st Cir. 1979) (subjective intent of officer is not a relevant consideration in determining whether defendant had been deprived of his liberty).

Perhaps the disarray amongst the Circuits is caused by the paucity of clear precedent from this Court. Compare *Sibron v. New York*, 392 U.S. 40, 64 (1968) (where the officers' subjective purpose in reaching into the suspect's pocket was held to be determinative of whether it was a "weapons pat down" or an exploratory search) to *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) ("A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' ").

II.

A DE FACTO ARREST TOOK PLACE WHEN THE OFFICER BLOCKED COMPLETELY THE DEFENDANT'S AIRCRAFT, RETAINED POSSESSION OF THE DEFENDANT'S PILOT'S LICENSE, MEDICAL CERTIFICATE, AND REGISTRATION FOR THE AIRCRAFT, DID NOT INFORM THE DEFENDANT THAT HE WAS FREE TO LEAVE, ACCUSED THE DEFENDANT OF CRIMINAL ACTIVITY, AND THE DEFENDANT DID NOT BELIEVE HE COULD LEAVE AND, IN FACT, COULD NOT HAVE LEGALLY OPERATED THE AIRCRAFT WITHOUT THE DOCUMENTS

The appellate panel stated:

> The line between a valid investigatory stop and an arrest requiring probable cause is a fine one. *United States v. Hanson*, 801 F.2d 757 (5th Cir. 1986). Although there is no litmus test for making this determination, an investigation detention must last no longer than is necessary to effect the purposes of the stop and should employ the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983). *See also United States v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985). (A-6).
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> * * *
>
> . . . We hold, however, that, based upon the totality of the circumstances, the level of intrusion prior to the consent search was no more than necessary to dispel the officers' legitimate suspicions. (A-8)

The appellate court stated in its within opinion that:

> The critical question, however, is whether this seizure constituted a *Terry* stop, requiring only reasonable suspicion, or a *de facto* arrest, which would require probable cause. (A-6).

The opinion later stated:

> . . . Although both sides agree that the search was voluntary, it cannot be justified if the preceding level of intrusion made the seizure a *de facto* arrest before the consent was given, as Zukas argues

was the case. We hold, however, that, based upon the totality of the circumstances, the level of intrusion prior to the consent search was no more than was necessary to dispel the officers' legitimate suspicions. . . . (A-8).

The actions of the police commenced after the defendant completed preflight preparations and the departure of the aircraft appeared imminent, at which point Nestoroff pulled his car directly in front of the wing of the plane. The aircraft, parked in a corner formed by fences and able to move forward only, was blocked by Nestoroff's car. Nestoroff acknowledged that the defendant could not depart unless he moved his car. (R-4-61, 62, 70, 115). Nestoroff showed his badge and informed the defendant that he was conducting a "ramp check" and wanted to see the defendant's pilot's license, medical certificate, registration and paperwork for the aircraft. (R-4-63). Nestoroff checked the documents and found them in order, but retained possession of them, and informed the defendant twice that he suspected that the aircraft was hauling contraband. (R-4-63-65-66). The defendant did not believe that he was free to leave and was never told that he was free to leave and, in any event, could not have left without his documents and without Nestoroff moving his car. (R-4-18, 68-70). Nestoroff continued to retain possession of the documents during the entire stop and detention. (R-4-66).

The rationale for finding a *de facto* arrest is contained in *Florida v. Royer*, 460 U.S. 491 (1983). *Royer* involved a detention at a public airport when the officer requested and retained Royer's driver's license and airplane ticket. Unlike the instant case, Royer was questioned in a small room and his luggage was retrieved from the airplane by police. However, those actions are not dissimilar from the blocking of Zukas' plane by Nestoroff's car. In *Royer*, like the case at bar, the defendant was told he was suspected of smuggling and was never informed that he was free to leave. Based on

these facts, this Court held that the encounter was no longer consensual, that the detention had exceeded the permissible bounds of a "Terry" stop, and that a seizure protected by the Fourth Amendment occurred when law enforcement officers retained an airplane ticket. *Royer*, 460 U.S. at 502.

In the instant case, Nestoroff parked his car in front of the aircraft, blocking the aircraft so it could not leave until the car was moved. (R-4-62,70). Nestoroff took the defendant's pilot's license, medical certificate, registration and paperwork for the aircraft. After checking the documents and finding them in order—but retaining possession of them—Nestoroff twice informed the defendant that he suspected the aircraft was hauling contraband. (R-4-63-65). The defendant was not told he was free to leave and, as an FAA expert testified, the defendant could not have left without the documents since pilots cannot fly without a license in their possession. (R-4-68-70). Nestoroff continued to retain possession of the documents during the entire stop and detention. (R-4-66). The defendant did not believe that he was free to leave. (R-4-18).

The decision of the Court of Appeals in finding that the seizure of Petitioner did not constitute an arrest is a substantial error of law which this Court should correct in the exercise of its supervisory power.

III.

MATCHING THE CHARACTERISTICS OF THE "NESTOROFF" DRUG PROFILE DOES NOT CREATE REASONABLE SUSPICION TO JUSTIFY DETAINING A DEFENDANT

The seizure in the instant case was not supported by reasonable suspicion as required by *Terry v. Ohio*, 392 U.S. 1, 21 (1968). The only "specific activities" observed by the agents were the same activities which constitute the

characteristics of the "Nestoroff" drug profile. Likewise, the prior arrest record of the defendant was merely a profile characteristic.

The court of appeals avoided making a specific statement that matching the characteristics of the "Nestoroff" drug profile, in and of itself, gives reasonable suspicion to detain a defendant. The opinion is ambivalent on this issue, saying only

> . . . Taken alone, no single factor would support a reasonable, particularized suspicion with regard to the activities of Zukas and his passenger. **When these factors, however, are considered together with Zukas's prior record, the specific activities observed by the agent and informant, and the agents' level of experience and expertise, their significance renders the whole greater than the sum of its parts.** (A-7-8).

A review of this Court's treatment of the drug courier profile reveals some imprecision regarding the use of the profile but a clear recognition of the danger of mechanistic reliance upon it to justify seizures.

This Court held in *Reid v. Georgia*, 448 U.S. 438 (1980), that a profile compilation of characteristics typical of drug couriers could not be a basis for reasonable suspicion, must less probable cause, because these characteristics also describe a large category of presumably innocent travelers who would thus be subject to virtually random seizures.

In *United States v. Mendenhall*, 446 U.S. 544 (1980), Justices Stewart and Rehnquist wrote that the petitioner was either not seized or she voluntarily accompanied the officers to the DEA office. The Chief Justice and Justices Powell and Blackmun concurred by concluding that the petitioner was

seized but that the seizure was justified because her behavior matched the drug courier profile. Justices White, Brennan, Marshall and Stevens dissented with an opinion which questioned the efficacy of the drug courier profile in providing reasonable suspicion.

Thus, the proper role of the drug courier profile in determining suspicion or probable cause has never been clearly explained by this Court except to say that drug courier profile characteristics, standing alone, will not automatically provide reasonable suspicion.

There is an active conflict between the Circuits regarding the role of the drug courier profile in determining probable cause. The Fourth Circuit Court of Appeals in *United States v. Aguiar*, 825 F.2d 39 (4th Cir. 1987), held that such drug courier profile characteristics could be considered in connection with particularized but slightly suspicious facts to arrive at a sum of probable cause. Such action is in direct conflict with the Sixth Circuit Court of Appeals' decision in *United States v. Lewis*, 556 F.2d 385, 389 (6th Cir. 1977), which held that the fact the defendant exhibited drug courier profile characteristics could not be mechanistically considered in conjunction with other particularized facts which themselves fell short of probable cause. The Sixth Circuit Court of Appeals noted that the drug courier profile is (1) too amorphous to be integrated into a legal standard, (2) the profile would lead to improper analysis because it could not be synthesized into the sum total of information, and (3) use of the profile could too easily result in giving undeserved significance to certain facts and distort appraisal of the sum total of facts.

The pronouncement by the Court of Appeals in the case *sub judice* that the profile factors become a sum greater than their parts when interpreted by the expert drug interdiction officer are in direct conflict with *Lewis* and the analysis by

the Ninth Circuit in *United States v. Sokolow*, 831 F.2d 1413, 1418-1420 (9th Cir. 1987):

> Courts are not obliged to accept blindly any fact the police can muster when the government fails to establish any credible connection between that fact and a suspicion of **ongoing** (or recently completed) criminal activity. Nor is the phrase "drug courier profile" a talismanic label that the government can apply to any given set of facts to obviate consideration of whether reasonable suspicion existed. Indeed, it is obvious that the "drug courier profile" often has a chameleon-like way of adapting to any particular set of observations.

The important reminder contained in *Sokolow* is that a profile does not provide evidence of **ongoing** criminal activity:

> The "mosaic" presented by the government . . . fails to form an image of **ongoing criminal activity**. Instead, we see a vaguer shape resulting from the improper attempt to define not ongoing criminal activity but a class of people that is predominantly criminal. The Supreme Court, by contrast, requires that the reasonable suspicion supporting an investigative stop be reasonable suspicion of an **ongoing crime**, and thus forecloses the result requested by the government.

In *Sokolow*, the defendant purchased round-trip plane tickets with $2,100 cash from a wad of bills. The round-trip from Honolulu to Miami was for a short turnaround. During a change of planes in Los Angeles, the defendant was very nervous and dressed in a black jump suit with lots of gold jewelry. Upon arrival in Honolulu, he left the airport with only carry-on luggage.

The similarity to the facts at bar is inescapable: The $2,100 cash expenditure for a 3-day trip is a more lavish cash expenditure with less economic justification than Zukas' purchase of $386.10 in fuel for a cross country charter with a single passenger. The nervousness of Sokolow in "looking all around the passenger area" is no different than the nervous passenger in the instant case. The bejeweled jump suit of Sokolow was more unusual than the "Miami Vice" attire of the passenger and the blue jeans of charter pilot Zukas.

The *Sokolow* court rejected the argument that profile-type characteristics become particularized suspicion merely because the officer testified they are unusual:

> **In this type of case, the traditional focus on criminal activity shifts to a focus on the personal characteristics of the individual under scrutiny.** Not only is this transfer of focus impermissible, its accuracy is often uncorroborated. Here, an officer must testify that a pattern of behavior, otherwise explicable as innocent behavior, does not exist in a significant number of innocent people. The officer testifies not about his own trained observation of a criminal activity, but instead about the probability that drug couriers generally exhibit certain external characteristics. . . . The court is left to evaluate **not** the reasonableness of an officer's assessment of facts demonstrating an ongoing criminal enterprise, but the probabilistic evidence (compiled from cases not before the court) that indicate that "innocent" behavior is not so innocent.

* * *

Without a definitive opinion from this Court on the proper use of profiles, the courts will continue to issue contradictory rules, and innocent but eccentric behavior will put citizens at peril.

CONCLUSION

The Court is urged to grant certiorari in order to settle the important issues of federal law and to resolve conflicts between circuits.

Respectfully submitted,

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Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Anton Gregory ZUKAS,

Defendant-Appellant.

No. 87-1568.

United States Court of Appeals,
Fifth Circuit.

April 12, 1988.

Defendant was convicted in the United States District Court for the Western District of Texas, James R. Nowlin, J., of conspiracy to possess with intention to distribute cocaine, and he appealed. The Court of Appeals, E. Grady Jolly, J., held that: (1) stop of defendant and his airplane passenger was an investigation stop, not a de facto arrest, and (2) reasonable suspicion justifying the stop was presented.

Affirmed.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, REAVLEY and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

In this appeal from his conviction for conspiring to possess with intent to distribute cocaine, Anton Zukas challenges the

district court's denial of his motion to suppress evidence. We affirm.

I

Anton Zukas was charged with conspiring to possess with intent to distribute cocaine and entered a guilty plea conditioned upon the outcome of his suppression hearing. The court denied his motion to suppress the cocaine, which was found in the luggage of the passenger of the plane that Zukas had leased and flown from Miami to Texas. Zukas was sentenced to fifteen years imprisonment and fined $10,000. Zukas contends that the search was the result of a *de facto* arrest made without probable cause, thus violating fourth amendment search and seizure requirements. The district court found, however, that the search was based on reasonable suspicion, and was no more intrusive than that suspicion warranted.

Zukas and his passenger became the subject of an investigation by the Drug Enforcement Administration ("DEA") based upon their conformity with DEA drug-smuggler profiles. At the bench trial, the district court made the following findings of fact. The investigation began November 5, 1986, when a confidential informant contacted Robert Nestoroff, a narcotics agent with the Texas Department of Public Safety. The informant, known by Agent Nestoroff for three or four years, had supplied reliable and accurate information in the past. The informant told Nestoroff that Zukas and one passenger had arrived at the municipal airport in Austin, Texas, in a Piper Navaho aircraft, and paid in cash for refuelling. The informant noted that the plane had extended-range fuel tanks and that the passenger, a "Miami-Vice type," appeared very nervous, wore gold jewelry and carried a large amount of cash. The two men left for a hotel.

Agent Nestoroff, an experienced DEA agent, drove to the airport to look at the aircraft. He observed that, in addition to extended-range fuel tanks, it had tinted windows and high security locks. Nestoroff went to the hotel where he discovered that both men had paid cash for their rooms, requested 5:30 a.m. wake-up calls, and the passenger, a California resident, had made long-distance calls to California.

Nestoroff ran a computer check on the pilot of the plane and discovered that Zukas was a suspected narcotics smuggler who had previously been arrested in connection with a seizure of marijuana from an aircraft. Nestoroff also learned that the Piper had been leased through Sun States Aviation, a legitimate business that provided the type of aircraft preferred by smugglers. He further discovered that the flight had originated in Miami and had flown to Austin via Tallahassee.

At trial Nestoroff testified that the aircraft used by narcotics smugglers are often equipped with extended-range fuel tanks, tinted windows and high security locks. He also testified that the suspects' route from Miami—a known drug-trafficking center—to California—another known trafficking center—via Austin, Texas, and their schedule—arriving late in the day and leaving early—were consistent with other smuggling operations with which he was personally familiar. In addition, the nervousness of the passenger, the facts that the men had paid cash for the fuel and hotel, that they arrived late in the day and planned to leave early the next (when police officers generally are not on duty) all supported the suspicion that these men might be smugglers.

[1] Based upon the informant's observations of the suspects, his own observations of the aircraft, Zukas' prior history, the ownership of the aircraft and the flight schedule, Agent Nestoroff decided to return to the airport the next

morning with two other officers and a dog trained in drug detection. While one officer and the dog waited farther away from the scene, Nestoroff and a fellow officer drove onto the tarmac in order to observe the men while they were engaged in preflight preparations. When it became apparent that the suspects were making final flight preparations, Nestoroff parked his car in front of the plane in a way that blocked its access to the runway. Nestoroff testified that at this point he approached the aircraft to perform a ramp check. A ramp check, authorized by state and federal law, permits officers of the Federal Aviation Administration ("FAA") or police to examine the pilot's and aircraft's licensing and certification to ensure that they conform to FAA regulations. Zukas furnished the appropriate documents, which Nestoroff examined and determined were valid. Instead of returning these documents, however, Nestoroff retained them and informed the pilot that the agents suspected that the aircraft was being used to transport controlled substances. Zukas stated that he did not know who owned the aircraft. Nestoroff left Zukas to continue his work, and went to the rear of the plane to talk with the passenger who had been speaking to a second officer. This officer had informed the passenger that the DEA agents suspected that the aircraft contained controlled substances, but also told him that he was not under arrest. Nestoroff learned at this time that this passenger had been travelling under a false name.

Nestoroff then asked Zukas if he would consent to a search of the aircraft. Zukas agreed and the passenger also consented to a search of his own bags. The agents found cocaine in the passenger's bag and placed both men under arrest. Zukas then informed the officers that the passenger had a second bag in the aircraft. This bag was also searched and found to contain cocaine.

II

[2-4] To analyze the appellant's fourth amendment contentions, we must determine first at what point a fourth amendment seizure occurred and then determine whether the particular intrusion caused by the seizure was justified by the requisite amount of suspicion supported by objective facts. The Supreme Court has identified three tiers of citizen-police contact for purposes of fourth amendment analysis. *United States v. Berry*, 670 F.2d 583 (5th Cir.1982). The first tier, communication between police and citizens, involves no coercion or detention and does not implicate the fourth amendment. An investigatory stop, at the second level of contact, is a brief seizure that must be supported by reasonable suspicion, that is "specific and articulable facts, which taken together with rational inferences from these facts reasonably warrant an intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). Finally, a full scale arrest must be supported by probable cause. *Berry*, 670 F.2d at 583.

[5] The district court determined that seizure occurred when Nestoroff and the other agent parked their car in front of the plane for the purpose of conducting a "ramp check."[1] Clearly, when the police officers parked their car in front of the plane, approached the pilot and asked for identification and registration papers, then informed him, without returning those papers, that he was suspected of smuggling

[1]We recognize that, according to Nestoroff's own testimony, this ramp check may indeed have been a pretext and conducted only to further his investigation. Although Zukas therefore objects to the validity of the ramp check, this issue is disposed of in our opinion in *United States v. Causey*, 834 F.2d 1179 (5th Cir.1987) (en banc), which validated so-called pretextual arrest warrants. The reasoning of that case would also apply here to the use of a pretext for an investigatory stop. We continue our analysis, however, since the "stop" continued even after the pilot's documents had been verified, thus exceeding the bounds of the ramp check.

drugs, the police-citizen contact constituted more than mere communication. In view of the circumstances present here, we hold that at this point a fourth amendment seizure had occurred.

The critical question, however, is whether this seizure constituted a *Terry* stop, requiring only reasonable suspicion, or a *de facto* arrest, which would require probable cause. This determination depends upon whether the level of intrusion was justified given the totality of the circumstances and the government interest involved. *Berry*, 670 F.2d at 601, 602.

[6] The line between a valid investigatory stop and an arrest requiring probable cause is a fine one. *United States v. Hanson*, 801 F.2d 757 (5th Cir.1986). Although there is no litmus test for making this determination, an investigation detention must last no longer than is necessary to effect the purposes of the stop and should employ the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983). *See also United States v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed.2d 605 (1985).

The district court determined that the government officers had reasonable suspicion to justify a *Terry* stop and that the search and seizure which followed was justified by this level of suspicion and did not amount to a *de facto* arrest. Zukas contends, however, that the government's actions were based primarily on Zukas's conformity to a drug-smugglers profile, rather than any particularized suspicion, so that the seizure was not based on a legitimate level of suspicion. He further claims that even assuming that a reasonable suspicion existed, the detention was so intrusive that it became a *de facto* arrest before probable cause was established and was therefore impermissible. We agree with the district court's analysis, however.

In *Berry*, this court determined the appropriate use of DEA profiles. The court noted that such profiles are primarily an administrative tool and consequently mere conformity with the characteristics of the drug-smugglers' profile does not necessarily provide reasonable suspicion. On the other hand,

> if an officer can demonstrate why some factor, interpreted with due regard for the officer's experience and not merely in light of its presence on the profile, was, in the particular circumstances of the facts at issue, of such import as to support a reasonable suspicion that an individual was involved in drug smuggling, we do not believe that a court should downgrade the importance of that factor merely because it happens to be part of the profile.

Berry, 670 F.2d at 600.

[7] In this case, both Nestoroff and his fellow officer were experienced DEA agents who had particular experience with drug traffickers stopping in Austin and had the following information: (1) Zukas flew a small aircraft with extended-range fuel tanks, tinted windows and high security locks, the type often used by drug smugglers; (2) the aircraft was owned by a company which, though itself legitimate, often leases aircraft to drug smugglers; (3) Zukas and his passenger paid cash for fuel and a hotel room, as is often done by drug smugglers; (4) the plane flew from Miami, a drug traffic center to Texas, and was apparently headed to California, another drug-trafficking area; (5) the passenger appeared nervous, wore gold jewelry and carried a large amount of cash; (6) calls had been made from their motel to California, and (7) Zukas had a prior drug-smuggling arrest and was a suspect of the DEA. Admittedly, several of these factors have no independent significance except that they fit the DEA's drug-smugglers' profile. Taken alone, no single factor would

support a reasonable, particularized suspicion with regard to the activities of Zukas and his passenger. When these factors, however, are considered together with Zukas's prior record, the specific activities observed by the agent and informant, and the agents' level of experience and expertise, their significance renders the whole greater than the sum of its parts. When the officers began questioning Zukas and the passenger, therefore, the seizure was supported by reasonable suspicion and justified to the extent that it was no more than an investigatory stop.

[8] The suspicion did not rise to the level of probable cause, though, until after Zukas and the passenger had consented to a search that resulted in the discovery of cocaine. Although both sides agree that the search was voluntary, it cannot be justified if the proceeding level of intrusion made the seizure a *de facto* arrest before the consent was given, as Zukas argues was the case. We hold, however, that, based upon the totality of the circumstances, the level of intrusion prior to the consent search was no more than was necessary to dispel the officers' legitimate suspicions. Although the officers parked on the tarmac in front of the plane, their actions did not impede or interfere with Zukas's preflight preparations. The officers did not require the suspects to move to a new locale in order to conduct their investigation. We concede Zukas's argument that it is clear from the facts and from Nestoroff's testimony that Nestoroff would have been most reluctant to let the plane fly away; however, his subjective intent is not important in determining whether an arrest was made and he made no statements during the investigation to indicate to Zukas that he would impede or prevent Zukas and his passenger from departing the area if they had been prepared to do so. The presence of the two officers and their car must be considered inhibiting to some extent, but this was mitigated by the officers' casual approach, the fact that they displayed no weapons, wore plain clothes, were in an unmarked car, and advised the passenger

that he was not under arrest. Considering all these factors and the level of legitimate suspicion, the government's interest justified the limited intrusion made upon the individuals' right of movement. We hold, therefore, that given the totality of the circumstances, the level of intrusion was justified by the officers' legitimate and reasonable suspicion. The district court did not err when it denied Zukas's suppression motion.

For the foregoing reasons, the judgment of conviction is

AFFIRMED.

[FILED JUL 16 '87]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CRIMINAL NO. A-86-CR-114(1)

UNITED STATES OF AMERICA

VS.

ANTON G. ZUKAS

ORDER

Before the Court is the Defendant's Motion to Suppress, Motion to Suppress Oral and Written statements and Motion to Suppress Evidence Due to Improper Police Procedure. On April 17 and April 27, 1987, the Court conducted an evidentiary hearing on the Defendant's various motions to suppress. The Court has considered the motions, the arguments of counsel, the evidence adduced at the hearings on this motion, as well as all of the pleadings in this cause, and hereby enters the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

On November 5, 1986, Robert Nestoroff, a narcotics agent with the Texas Department of Public Safety, was contacted by a confidential informant at approximately 9:30 p.m. The informant advised Nestoroff that a Piper Navajo twin-engine aircraft had just arrived at Atlas West Terminal, a fixed base operation located at Robert Mueller Municipal Airport, Austin, Texas. The informant told Nestoroff that the pilot asked that the aircraft be refueled. The aircraft took 198

gallons of fuel, an indication that it was equipped with extended-range fuel tanks. Upon closer inspection the informant saw the extended-range fuel tanks. The pilot paid cash for the fuel. In addition, the informant told Nestoroff that the only passenger on the aircraft appeared to be extremely nervous; so nervous, in fact, that he had a hard time holding a cup of coffee without spilling it. Further, the informant told Nestoroff that every time he attempted to write a physical description of the pair, the passenger became more nervous and would attempt to see what the informant had written. The informant told Nestoroff that the passenger was "the Miami-Vice type," wore a notable amount of gold jewelry, and carried a large amount of cash. After arrangements were made to park the aircraft for the evening, the pilot and the passenger departed in an Embassy Suites Courtesy Car. Both men carried small overnight bags.

Agent Nestoroff testified that he had known this confidential informant for three or four years, and that they had become friends. The informant has no role in law enforcement other than that of a concerned citizen. The informant frequently calls Agent Nestoroff when potential drug smuggling activity is observed by the informant. Agent Nestoroff testified that the informant has more opportunities to observe such activity because of the informant's employment.

Based upon the information provided by the informant, who had supplied reliable and accurate information in the past, Agent Nestoroff decided to drive to the airport and look at the aircraft. Before leaving, however, he telephone his superior and told him of the information supplied by the informant. Nestoroff's superior agreed that he should proceed with an initial investigation. When Agent Nestoroff arrived at the airport, the informant identified the aircraft in question. He noted that the aircraft was equipped with a "panther conversion," a fuel tank conversion that facilitates

extended-range flights; tinted windows with curtains; and Medico high security locks on every keyed opening to the aircraft.

Nestoroff testified that aircraft used by narcotics smugglers are often so equipped. Agent Nestoroff decided to continue the investigation based upon the information provided by the informant as well as his own observations. Before he left the airport Nestoroff asked his informant "to keep an eye on the plane." He did not, however, tell the informant where the aircraft should be parked for the evening, or give any other instructions.

Thereafter, Nestoroff went to the Embassy Suites Hotel. There he determined that the pilot and passenger had obtained separate rooms. The pilot had registered in the name of Antone Zukas of 9251 Southwest 150th, Miami, Florida. The passenger registered in the name of Troy Climes of 20422 Kelvine Grove, Huntington Beach, California. Both parties paid cash in advance for the rooms and requested 5:30 a.m. "wake-up" calls for the next morning. Moreover, Nestoroff learned that two long distance calls to California had been placed from Climes' room. Nestoroff then left the hotel. He testified that the origin and destination of the suspects' flight and their schedule was consistent with smuggling operations.

Later that night, Nestoroff learned that the United States Customs Service had no information about a Troy Climes, however, the Treasury Enforcement Computer System did list an Anton Gregory Zukas who fit the pilot's description. Zukas was listed as a suspected narcotics smuggler who held a pilot's license. Further, the computer notation reflected that Zukas had been previously arrested in connection with the seizure of an aircraft and 1500 pounds of marijuana. Nestoroff then learned that the aircraft had been leased through Sun State Aviation. Though Sun State is a licensed and apparently legitimate business, Nestoroff testified that it

frequently caters to smugglers, and provides the type of aircraft preferred by smugglers. Based upon his informant's observations of the suspects; his own observations of the aircraft; his knowledge that an Anton Zukas had a prior history of smuggling; his knowledge of the aircraft's origin; his knowledge of the suspects' flight origin and destination, as well as their proposed schedule; Agent Nestoroff decided to return to the airport the next morning with two other officers. He contacted Officer Walsh and asked that they meet the next morning at the airport. Nestoroff further asked that Walsh bring his dog that had been specially trained to detect drugs. Nestoroff also called Airport Police Sergeant Krug and asked that he assist the next morning. Nestoroff testified that at this point he did not feel as though he had sufficient probable cause to support a search warrant.

The next morning, Nestoroff, Walsh and Krug met at the airport. Krug was positioned inside a hangar. Walsh and Nestoroff positioned themselves in Nestoroff's car within sight of the aircraft. The aircraft had been parked on the apron in close proximity to the airport office. It was backed into position with its tail within several feet of the junction of two cyclone fences. The aircraft had been parked prior to the agents' arrival. None of the officers had directed the placement of the aircraft.

Shortly thereafter, Nestoroff observed an individual approach the aircraft, open the pilot's door and place a bag in the aircraft. The individual then opened the luggage compartment and began a pre-flight inspection. Based upon these observations and his prior knowledge, Nestoroff assumed that this individual was the pilot, Zukas. The individual then went back to the hanger. Several minutes later he returned to the aircraft with another man who met the description of Troy Climes. Zukas was carrying a box. Nestoroff waited to see if anyone else would appear at the aircraft, or if any activity indicated that the suspects were

engaged in a legitimate undertaking. When it become apparent that the suspects were about to leave, he drove his car to the front of the aircraft and approached Zukas. Officer Walsh approached the passenger and determined that his name was John Troy Bruce. Sergeant Krug positioned himself at the tail of the aircraft.

Nestoroff testified that at this point, he had no intention of arresting the suspects. He approached them in order to ascertain the status of the aircraft, whether or not Zukas was properly licensed, and to adduce additional facts about the suspects. Nestoroff stated that this procedure is commonly called a "ramp check" and is authorized by federal and state regulations. Nestoroff identified himself as a DPS officer and requested Zukas' license and aircraft documentation. Zukas produced his pilot's license bearing the name Antone Gregory Zukas and the required aircraft documentation. Agent Nestoroff then informed Zukas that they suspected that the aircraft was used for the transportation of controlled substances. Zukas stated that he did not know who owned the aircraft. At this point, Officer Walsh, motioned for Nestoroff to come toward the rear of the aircraft where he was talking with the passenger. Nestoroff turned his back on Zukas, who began adding oil to the craft's right engine, and joined Walsh for a three or four minute period. Walsh told Nestoroff that the passenger had identified him as John Troy Bruce, and that he appeared nervous and ill at ease. Walsh had informed Bruce that the officers suspected that the aircraft carried controlled substances. Walsh testified that he informed the passenger that he was *not* under arrest. Nestoroff then returned to the front of the aircraft where Zukas had been working. Nestoroff again informed Zukas that he suspected that the aircraft was being used to transport controlled substances, and asked if Zukas would consent to a search of the aircraft. Agent Nestoroff testified that he would have returned Zukas' license and aircraft documentation and allowed Zukas to leave at this point if

Zukas had made that request. Nestoroff testified that Zukas never asked for his license or other documents, and never asked to leave. Moreover, he stated that Zukas did not appear shocked or surprised but rather laughed in the face of this allegation and stated: "You are welcome to search the plane and my luggage; I have nothing to hide." None of the officers told the suspects that they had authority to search the aircraft, nor was either suspect aware that a trained police dog was at Nestoroff's disposal. Officer Walsh testified that Bruce denied possession of any controlled substances and consented to a search of his luggage. Bruce identified as his, a brown bag that he had carried from the hanger and a large blue-gray suitcase stowed in the still-open foreward compartment. Neither Zukas or Bruce attempted to revoke their consent to search. The officers began the search of the aircraft with the blue-grey suitcase, based upon the suspects' joint consent. Inside the suitcase were a large number of packages wrapped in colored tape and paper. Upon inquiry, Bruce told the officers that the packages contained presents for a friend. One of the officers cut open one of the packages and found a white powdery substance he believed to be cocaine. At this point both Zukas and Bruce were told that they were under arrest and advised of their *Miranda* rights. Thereafter, Zukas advised that there was another suitcase in a wing compartment. This suitcase was located, opened, and found to be full of the same substance discovered in the first suitcase.

On cross-examination Agent Nestoroff testified that the Defendants had not been pre-targeted by any law enforcement officers as far as he knew. Moreover, he testified that the confidential informant was not paid a contingent fee, but was paid a $3,000.00 reward for "outstanding service to the community." Nestoroff noted that upon presentation of the reward the informant was astonished and overwhelmed. Moreover, he noted that the informant had

provided good and reliable information in the past, and had no criminal record.

Upon further cross-examination Nestoroff testified that the aircraft was parked in a location that had public access. He noted that there was a large amount of foot-traffic around the area. Nestoroff testified that none of the officers had worn uniforms on the day of the search. Further, he stated that they approached the aircraft in a casual manner, with no show of force; no weapons or handcuffs were displayed though each officer carried those items concealed. Nestoroff noted that the conversations with the suspects were in calm, conversational tones. Neither suspect was physically touched or ordered to stay in a particular location until their arrest. Nestoroff testified that either suspect could have revoked the consent to search and left the airport up until the white powdery substance was discovered in the blue-grey suitcase. He did state that he would have to move his car before the aircraft could have left.

Defendant Zukas testified that he first saw the aircraft in issue on October 1, 1986. He stated that he only had limited access to the craft and flew it only when he was told to do so. He admitted that as the pilot on a charter flight he maintained possession of the keys to the craft and stowed all luggage for passengers. Zukas testified that he had no knowledge of what was contained in Bruce's bags. He stated that when Agent Nestoroff pulled in front of the aircraft it would have been impossible for him to leave in the craft. Moreover, he testified that he could not leave without his pilot's license and the aircraft documentation that were held by Nestoroff. For these reasons, Zukas stated that he "felt" as though he were under arrest, though he admitted that no one told him he was under arrest and that he never asked to leave or asked that Nestoroff return the documents. Zukas testified that on two occasions Nestoroff had instructed Zukas to remain at the front of the aircraft. Nestoroff's version is

supported by Walsh's testimony; the Court finds Zukas' testimony on this point incredible.

On cross-examination, Zukas admitted that he had a bachelor's degree from the University of Miami. He stated that he received military flight training in 1968, and was capable of flying several military jets. He also admitted that he had received general training in military justice during his tour. Further, Zukas admitted that he had been arrested in 1979 and been advised of his rights at that time. He had retained counsel as a result of that arrest. Zukas admitted that he was familiar with his basic rights as outlined in *Miranda*. Finally, Zukas admitted that he never revoked his consent to search; that he never asked Nestoroff to return his documents; and that he never asked whether he could leave.

II. CONCLUSIONS OF LAW

When a police officer briefly stops an individual for communication purposes, and there is no restraint on the individual's movement, there has been no seizure for purposes of the fourth amendment. *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Maldonado*, 735 F.2d 809, 814 (5th Cir. 1984). On the other hand, an investigative stop involves some restraint of movement; thus, the stop must be supported by a reasonable suspicion based upon "specific and articulable facts which, taken together with rational inferences from these facts, reasonably warrant an intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *e.g., United States v. Cortez*, 449 U.S. 411 (1981). Finally, an arrest or seizure must be based upon probable cause. *United States v. Berry*, 670 F.2d 583, 591-94 (5th Cir. 1982). In order to determine whether a seizure has occurred, the Court must consider all of the circumstances and determine whether "a reasonable person would have believed he was not free to leave." *United States v. Hanson*, 801 F.2d 757, 761 (5th Cir. 1986) (citing *United States v.*

Mendenhall, 446 U.S. 544, 554 (1980)). An officer has not created an arrest environment by merely displaying his badge and asking questions. *United States v. Berd*, 634 F.2d 979, 984-85 (5th Cir. 1981). The Court may consider whether an individual has been informed that he is suspected of a crime or reaching this determination; however, this action is not dispositive. *See United States v. Glass*, 741 F.2d 83, 84-86 (5th Cir. 1984); *United States v. Elmore*, 595 F.2d 1036, 1042 (5th Cir.), *cert. denied*, 447 U.S. 910 (1980); *United States v. Notorianni*, 729 F.2d 520, 522 (7th Cir. 1984). Under the facts and circumstances of this case, the Court finds that the Defendants were neither under actual nor constructive arrest prior to the time they were told they were under arrest and read their *Miranda* rights. The stop occurred in a non-coercive and non-detention setting. The Court finds that Zukas' testimony to the contrary is wholly incredible. Thus, the Court must determine whether the officers had sufficient reasonable suspicion to justify their investigatory stop.

Whether reasonable suspicion is present turns on the particular facts and circumstances of each case. *See Mendenhall*, 446 U.S. at 554; *Elmore*, 595 F.2d at 1039-40. The facts established by the testimony in this case are more than adequate to support a finding that the officers had sufficient reasonable suspicion to warrant an investigatory stop. The Court specifically finds that the testimony of Agent Nestoroff and Officer Walsh is credible and accurately reflects the facts and circumstances surrounding this case. Moreover, the Court specifically finds that the testimony of Mr. Zukas, insofar as it contradicts that of the officers, is incredible, uncorroborated and not worthy of belief. The Court must now turn to whether the search was valid.

Searches conducted without a warrant are *per se* unreasonable—subject only to a few specifically established and well-defined exceptions." *Katy v. United States*, 389 U.S. 347, 356 (1967). The Government must establish that a

warrantless search falls within an exception. *Vale v. Louisiana*, 399 U.S. 30 (1969). Consent to search is a recognized exception. *United States v. D'Allerman*, 712 F.2d 100, 103 (5th Cir.), *cert. denied*, 464 U.S. 889 (1983). The Government must establish, based upon a totality of the circumstances, that the consent was given freely and was not the result of coercion or acquiescence. *United States v. Gomez-Diaz*, 712 F.2d 949 (5th Cir.), *cert. denied*, 464 U.S. 1051 (1983). The facts and circumstances in this case indicate that Bruce and Zukas knowingly and voluntarily consented to the search of the aircraft and the luggage. The consent was given in a non-coercive environment, i.e., a public airport. The interaction between the officers, Bruce and Zukas was casual and their discussions were in conversational tones. Thus, the totality of circumstances dictate that the consent was informed and voluntary, and the fruits of the search are admissible. Zukas gave effective consent to search the aircraft and his luggage, and Bruce gave effective consent to search his own luggage.

Thus, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant's Motions to Suppress are hereby DENIED.

SIGNED and ENTERED this 16th day of July, 1987.

/s/ James R. Nowlin

JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

No. 88-291

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

ANTON GREGORY ZUKAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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15 pp

QUESTIONS PRESENTED

1. Whether petitioner was arrested when a police officer approached him and asked him a few questions relating to the officer's suspicion that petitioner was transporting narcotics.

2. Whether petitioner's detention was supported by a reasonable suspicion that he was involved in narcotics trafficking.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-291

ANTON GREGORY ZUKAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 843 F.2d 179. The order of the district court denying petitioner's motion to suppress (Pet. App. 10-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1988. A petition for rehearing was denied on June 17, 1988. The petition for a writ of certiorari was filed on August 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the denial of his motion to suppress evidence in the United States District Court for the Western District of Texas, petitioner entered a conditional guilty plea to the charge of conspiracy to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 15 years' imprisonment and fined $10,000. The court of appeals affirmed.

1. The evidence at the suppression hearing showed that at approximately 9:30 p.m. on November 5, 1986, an employee at the Austin, Texas, municipal airport, who had provided reliable and accurate information relating to narcotics smuggling in the past, contacted narcotics agent Robert Nestoroff. The employee reported that a Piper Navajo twin-engine aircraft had just arrived at the airport. The aircraft was equipped with extended-range fuel tanks, and the pilot paid nearly $400 in cash for 198 gallons of fuel. The only passenger on the plane was extremely nervous and had difficulty holding his cup of coffee without spilling it. The informant described the passenger as a "Miami-Vice type" who wore a great deal of gold jewelry and carried a large amount of cash. The employee overheard the pilot state that the plane had come from Miami with a stop in Tallahassee. After making arrangements to park the plane, the pilot and the passenger took a courtesy car to a local hotel. Pet. App. 10-11; Gov't C.A. Br. 3.

Upon receiving the report from the employee, Agent Nestoroff drove to the airport to view the airplane. In addition to the extended-range fuel tanks, the plane had tinted windows with curtains and Medico high security locks on every keyed opening, all of which are characteristics common to aircraft used in narcotics smuggling.[1] At the

[1] Medico high security locks are favored by smugglers because they make it difficult for police officers to install tracking devices in the locked compartments. Gov't C.A. Br. 7.

hotel, Agent Nestoroff learned that the pilot had registered in the name Anton Gregory Zukas and had given a Miami address. The passenger had registered under the name Troy Climes and had given a California address. A computer check on those names disclosed that Zukas had previously been arrested in connection with the seizure of an aircraft and 1,500 pounds of marijuana. Both men paid cash for their rooms and requested a 5:30 a.m. wake-up call. The passenger made two telephone calls to California from his room. Agent Nestoroff also learned that the airplane had been leased through Sun State Aviation, a business that, although legitimate, provides the type of aircraft preferred by smugglers. Pet. App. 11-13; Gov't C.A. Br. 3-4.

The following morning, Agent Nestoroff and two other officers returned to the airport. Agent Nestoroff saw petitioner place a suitcase inside the plane and begin a preflight inspection. After walking back to the hangar, petitioner returned to the plane with the passenger and placed a box in the aircraft. Agent Nestoroff parked his car in front of the aircraft and approached petitioner; one other officer approached the passenger. None of the officers displayed any weapons, and none were in uniform. Pet. App. 13-14; Gov't C.A. Br. 4-5.

Agent Nestoroff asked petitioner if he could examine petitioner's pilot's license and aircraft documentation. Petitioner identified himself as Zukas. Agent Nestoroff advised petitioner that he suspected that the aircraft was being used to transport narcotics. Petitioner stated that he did not know who owned the aircraft. Agent Nestoroff then left petitioner to confer with his fellow officers at the rear of the plane. Those officers told Nestoroff that the passenger had identified himself as John Troy Bruce and had stated that he paid $1,600 to be flown to California. The officers advised Bruce, who was visibly nervous, that

he was not under arrest. Bruce then consented to a search of his luggage. During this time, petitioner continued to prepare the plane for flight by adding oil to the engine. Agent Nestoroff returned to petitioner, who was working at the front of the plane, and asked him if he would consent to a search of the aircraft. Petitioner laughed and stated, "You are welcome to search the plane and my luggage; I have nothing to hide." The officers initially searched a suitcase identified by Bruce as his. It contained a large number of packages wrapped in colored tape and paper. Bruce stated that the packages were presents for friends. An officer opened one of the packages and found a white powdery substance that he believed was cocaine. At that point, petitioner and Bruce were arrested and issued *Miranda* warnings. Petitioner told the officers that there was another suitcase in a wing compartment. That suitcase was also filled with packages of cocaine. Pet. App. 14-15; Gov't C.A. Br. 4-6.

2. The district court found that the initial confrontation between petitioner and the officers was supported by a reasonable suspicion that petitioner was involved in narcotics trafficking. Pet. App. 18. The court also held that petitioner and Bruce were not arrested until the officers discovered cocaine in the first suitcase. *Ibid.* Finally, the court found that both petitioner and Bruce voluntarily consented to the search of the aircraft and their luggage. *Id.* at 19.

3. The court of appeals affirmed. Pet. App. 1-9. It found that an investigative detention occurred when Agent Nestoroff informed petitioner, without returning his identification and registration papers, that he was suspected of smuggling drugs. *Id.* at 5-6. At the same time, the court held that the following facts, considered together, gave rise to a reasonable suspicion that justified the investigative detention: (1) the small aircraft with its tinted

windows, high security locks, and extended-range fuel tanks was a type favored by smugglers; (2) the aircraft was owned by a company that, although legitimate, frequently leased its planes to smugglers; (3) petitioner and his passenger paid cash for their fuel and hotel rooms; (4) the flight originated in Miami, a source city for drugs, and was headed to California, another drug-trafficking area; (5) the passenger was nervous, wore a great deal of gold jewelry, and carried a large amount of cash; (6) the passenger made calls from the hotel to California; and (7) petitioner had a prior arrest for drug smuggling. *Id.* at 7-8.

The court further held that petitioner was not arrested until the agents found cocaine in the first suitcase. The court explained that, prior to the formal arrest, the officers did not impede or interfere with petitioner's preflight preparations; they did not move petitioner to a different location; their approach was casual; they displayed no weapons; they wore plain clothes; and they advised the passenger that he was not under arrest. Under these circumstances, the court held, the level of intrusion was no more than necessary to dispel the officers' legitimate suspicions. Pet. App. 8-9.

ARGUMENT

1. Petitioner claims that he was arrested without probable cause before he consented to the search of the aircraft and the luggage. In that respect, he also argues that the courts below erred by not considering Agent Nestoroff's subjective intent in determining whether he was arrested. Neither claim has merit.

First, it is well settled that the test for determining whether a Fourth Amendment seizure has occurred is an objective one. That test is whether, " 'in view of all of the circumstances surrounding the incident, a reasonable per-

son would have believed that he was not free to leave.' " *Michigan* v. *Chesternut,* No. 86-1824 (June 13, 1988), slip op. 5 (citation omitted). Accord *INS* v. *Delgado,* 466 U.S. 210, 215 (1984); *Florida* v. *Royer,* 460 U.S. 491, 502 (1983) (plurality opinion); *United States* v. *Mendenhall,* 446 U.S. 544, 554 (1980) (opinion of Stewart, J.). See also *Maryland* v. *Macon,* 472 U.S. 463, 470-471 (1985) (adopting objective standard for determining whether a seizure has occurred); *Berkemer* v. *McCarty,* 468 U.S. 420, 442 (1984) (footnote omitted) ("[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation"). An objective standard is also used to determine the level of the intrusion, *i.e.,* whether the seizure is an investigative detention or an arrest. See, *e.g., Berkemer* v. *McCarty,* 468 U.S. at 442.

Sibron v. *New York,* 392 U.S. 40, 46-47 (1968), on which petitioner relies, does not state a contrary test. There, the Court merely stated that the search of a suspect's pocket could not be justified as a protective frisk for weapons in part because the officer never stated that he believed that the suspect was armed or otherwise dangerous. Because this Court has repeatedly rejected the argument that an officer's subjective intent is relevant to the question whether an arrest has occurred, further review of this matter is not warranted.[2]

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[2] Petitioner's reliance (Pet. 10) on several court of appeals decisions is misplaced. In *United States* v. *Longmire,* 761 F.2d 411, 414-415 (7th Cir. 1985), the court stated that the officer's intent was relevant to the question whether a detention is merely a *Terry* stop or amounts to a full custodial arrest. In so doing, the court relied on *Sibron,* which, as we have shown, does not support that proposition. The court also failed to cite this Court's later decision in *Berkemer* v. *McCarty, supra,* which rejected a subjective standard for determining

In any event, petitioner errs in claiming that Agent Nestoroff believed that petitioner was under arrest before he found the cocaine. To the contrary, according to the findings of the district court (Pet. App. 16), Agent Nestoroff testified that "either suspect could have revoked the consent to search and left the airport up until the white powdery substance was discovered in the blue-grey suitcase." Even if, as the court of appeals noted (*id.* at 8), Agent Nestoroff would have been "reluctant" to permit the plane to leave, his reluctance at most manifests an intent to detain petitioner. It does not show that Agent

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whether an arrest has occurred. The court's error in that one instance, however, has not affected the Seventh Circuit's analysis of the question whether particular conduct constitutes an arrest. In several subsequent cases, the Seventh Circuit has made clear that it adheres to the objective test for determining whether a suspect has been arrested. See *United States* v. *Espinosa-Alvarez*, 839 F.2d 1201, 1205 (1987); *United States* v. *Pavelski*, 789 F.2d 485, 488 (1986); *United States* v. *Dyer*, 784 F.2d 812, 815 (1986); *United States* v. *Borys*, 766 F.2d 304, 308-309 (1985), cert. denied, 474 U.S. 1082 (1986). The Eleventh Circuit's decisions in *United States* v. *Magdaniel-Mora*, 746 F.2d 715, 723 (1984), and *United States* v. *Lueck*, 678 F.2d 895 (1982), involved the related question whether a suspect was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Those decisions have been overruled by the subsequent decision of the Eleventh Circuit in *United States* v. *Phillips*, 812 F.2d 1355, 1359-1360 (1987), which adopted the objective test recognized by this Court. Likewise, the Fifth Circuit recently overruled that court's earlier decisions on which petitioner relies (Pet. 9-10 n.3). *United States* v. *Bengivenga*, 845 F.2d 593, 596-597 (1988) (en banc), petition for cert. pending, No. 88-170. To the extent that any court of appeals has stated to the contrary, those decisions have not survived the Court's decision in *Berkemer* or the Court's decision last Term in *Michigan* v. *Chesternut*, *supra*. Accordingly, in view of the considerable precedent from this Court adopting an objective standard, further guidance on this issue is unnecessary.

Nestoroff believed that his encounter with petitioner had evolved into an arrest prior to the discovery of the cocaine.

The objective facts also show that petitioner's detention was no more intrusive than a *Terry* stop until he was formally arrested. For example, the officers did not tell petitioner that he was under arrest; they displayed no weapons or handcuffs; they used no force against petitioner; and their conversation with him was casual. Petitioner continued to prepare the aircraft for departure while the officers spoke to him and his passenger. The encounter took place outside in a public area. And the officers specifically told Bruce that he was not under arrest.

Petitioner essentially relies on only two facts to support his claim that he was arrested: Agent Nestoroff parked his car in front of the aircraft, and he continued to hold petitioner's license and registration papers during their conversation. But neither fact is suggestive of an arrest in the circumstances of this case. Petitioner was not yet ready to take off and therefore neither action by Agent Nestoroff impeded petitioner in any way. See *United States* v. *Bengivenga,* 845 F.2d 593, 600 (5th Cir. 1988) (en banc), petition for cert. pending, No. 88-170. Compare *Florida* v. *Royer,* 460 U.S. at 503-504 & n.9 (the retention of Royer's ticket and luggage prevented him from taking his flight). At most, those two facts elevated what otherwise would have been a consensual encounter into a brief investigative detention.[3] They do not, however, elevate the level of

[3] Petitioner argues (Pet. 13) that he did not believe that he was free to leave. The district court, however, did not credit petitioner's testimony. Pet. App. 16-17. Moreover, petitioner's subjective intent is irrelevant for the same reasons that the officer's subjective intent is irrelevant. *Berkemer* v. *McCarty,* 468 U.S. at 442 & n.35. In any event, any suspect who is subjected to a *Terry* stop is "seized" within the meaning of the Fourth Amendment and is not free to leave until the

the encounter to that of an arrest. Petitioner suggests no conflict among the circuits on this question, and his fact-bound claim therefore does not warrant further review.

2. Both courts below correctly found that petitioner's detention at the airport was supported by a reasonable suspicion. The officers knew the following facts when they first asked to see petitioner's license and documentation: (1) the small aircraft, with its extended-range fuel tanks, tinted windows, and high security locks, was the type favored by drug smugglers; (2) the plane was leased from a company which, although legitimate, frequently leased aircraft to smugglers; (3) petitioner had a prior arrest for transporting drugs by plane; (4) his passenger was extremely nervous; (5) petitioner and his passenger used cash to pay for the fuel and their hotel rooms; (6) petitioner was traveling from a source city for narcotics (Miami) to an area of high consumption (California); and (7) the passenger was dressed in "Miami Vice" garb, including a great deal of gold jewelry, and he carried a large amount of cash. Pet. App. 7. By the time the agents sought petitioner's consent to search the plane, they also knew that the passenger had registered at the hotel under a false name; the passenger had paid $1,600 for the private two-day flight, which was both more expensive and less convenient than a commercial cross-country flight; and petitioner had claimed that he did not know who owned the airplane that he was piloting. Whether the detention occurred at the time of the initial approach or, as the court

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officer has had an opportunity to dispel or verify his suspicion. Accordingly, the fact that petitioner may not have been free to leave only indicates that he was subject to an investigatory detention for which reasonable suspicion was required. It does not indicate that he was arrested.

of appeals found, when the officers sought petitioner's consent to a search, the reasonable suspicion standard was met. An experienced narcotics officer viewing the whole picture (see *United States* v. *Cortez,* 449 U.S. 411, 417 (1981)) could reasonably infer from those facts that petitioner and his passenger were transporting narcotics from Miami to California.

Although we believe that the court of appeals' ruling was correct, this Court may nonetheless wish to hold this case pending its decision in *United States* v. *Sokolow,* cert. granted, No. 87-1295 (June 6, 1988). In that case, the Ninth Circuit held that the facts known to the agents were not sufficient to stop a passenger in a commercial airport on the suspicion that he was involved in narcotics trafficking. In its decision, the Ninth Circuit criticized the government's reliance on the so-called drug courier profile as a means of identifying narcotics traffickers, an argument that petitioner also presses here. Some of the facts in this case are similar to those in *Sokolow,*[4] but there are also differences. For example, the agents in this case knew that petitioner had a prior record of narcotics trafficking. That type of particularized information was not just another profile characteristic, as petitioner suggests. The officers also knew that petitioner was using a type of plane that is favored by drug smugglers. Because the private plane was more expensive and slower than commercial flights, the agents could reasonably have inferred that the two travelers were using a private plane in order to avoid air-

[4] For example, in both cases the suspects carried a great deal of cash and used cash to pay their traveling expenses. In both cases, the suspects traveled from Miami, the nation's principal source city for cocaine. Also, both Sokolow and petitioner's passenger were nervous and wore a great deal of gold jewelry.

port surveillance, to which commercial flights are subject. And there was an obvious discrepancy between the name that the passenger used at the hotel (Climes) and the name that he gave the officers at the airport (Bruce). That fact appears to be the type of direct proof of narcotics smuggling that the Ninth Circuit found critical to the reasonable suspicion determination in *Sokolow*. Accordingly, the judgment in this case should survive regardless of the outcome in *Sokolow*. Nevertheless, because the Court's decision in *Sokolow* could potentially affect the disposition of this case, we do not oppose holding the petition pending the decision in *Sokolow*.

CONCLUSION

As to the third question presented in the petition, the petition for a writ of certiorari should be held pending the Court's decision in *United States* v. *Sokolow*, cert. granted, No. 87-1295 (June 6, 1988), and then disposed of as appropriate in light of that decision. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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